Buffalo Law Review

Volume 32 | Number 3 Article 6

10-1-1983

Arbitrary Exclusions of "Undesirable" Racetrack and Casino Patrons: The Courts' Illusory Perception of Common Law Public/ Private Distinctions

Perry Z. Binder

ARBITRARY EXCLUSIONS OF "UNDESIRABLE" RACETRACK AND CASINO PATRONS: THE COURTS' ILLUSORY PERCEPTION OF COMMON LAW PUBLIC/PRIVATE DISTINCTIONS

INTRODUCTION

At common law, proprietors of privately owned places of entertainment and amusement were not obligated to serve the general public.[1] A distinction was made between the duties of people engaged in a "public calling,"[2] and those who operated private enterprises. While the former had a duty to admit patrons indiscriminately to their premises, the latter possessed a virtually limitless

---

1. *See, e.g.*, Marrone v. Washington Jockey Club, 227 U.S. 633 (1913) (patron excluded from racetrack); Capital Theatre Co. v. Compton, 246 Ky. 130, 54 S.W.2d 620 (1932) (theatre); Greenfeld v. Maryland Jockey Club, 190 Md. 96, 57 A.2d 335 (1948) (racetrack); Foster v. Shubert Holding Co., 316 Mass. 470, 55 N.E.2d 772 (1944) (theatre); Meisner v. Detroit, B.I. & W. Ferry Co., 154 Mich. 545, 118 N.W. 14 (1908) (ferry boat not considered a common carrier); Woollcott v. Shubert, 217 N.Y. 212, 111 N.E. 829 (1916) (theatre); Madden v. Queens County Jockey Club, 296 N.Y. 249, 72 N.E.2d 697, *cert. denied*, 332 U.S. 761 (1947) (racetrack); Buenzle v. Newport Amusement Ass'n, 29 R.I. 23, 68 A. 721 (1908) (dance hall); Boswell v. Barnum & Bailey, 135 Tenn. 35, 185 S.W. 692 (1916) (circus); Annot., 1 A.L.R.2d 1165 (1948).

2. "[T]he law of public calling originated between 1300 and 1400 because of the monopolistic and oppressive conditions of business and trade at the time of the Black Death [in England]." Arterburn, *The Origin and First Test of Public Callings*, 75 U. PA. L. REV. 411, 420 n.32 (1927). The early test of a public calling was set forth by Professor Wyman:

> Those in a public calling have always been under the extraordinary duty to serve all comers, while those in private business may always refuse to sell if they please. So great a distinction as this constitutes a difference in kind of legal control rather than merely one of degree. The causes of this division are, of course, rather economic than strictly legal; and the relative importance of these two classes at any given time, therefore, depends ultimately upon the industrial conditions which prevail at that period. Thus in the England which we see through the medium of our earliest law reports, the medieval system of established monopolies called for legal requirements of indiscriminate service from those engaged in almost all employments. There followed in succeeding centuries an expansion of trade which gradually did away with the necessity for coercive law.

Id. at 424 n.46 (quoting 1 B. WYMAN, PUBLIC SERVICE CORPORATIONS 2 (1911)). *See also* Wyman, *The Law of the Public Callings as a Solution to the Trust Problem*, 17 HARV. L. REV. 156 (1904) (public calling described and distinguished from private enterprises). Innkeepers and common carriers typify proprietors engaged in a business with a public calling. *Madden*, 296 N.Y. at 253, 72 N.E.2d at 698.

right to exclude customers arbitrarily.[3] Such distinctions were based upon the notion that places of amusement were not clothed with a "public interest"[4] and, therefore, proprietors were not required to accommodate everyone.

Racetrack proprietors additionally enjoyed an undisputed right to exclude patrons indiscriminately from their premises at common law,[5] so long as race, creed or color were not determinant factors.[6] These businessmen were neither engaged in a public calling, nor were they held to be clothed with a public interest:

> There is . . . nothing inherent in the nature of horse racing which makes operation of a race track the performance of a public function. . . .
>
> . . . .
>
> . . . [R]ace tracks may well be affected with a public interest sufficient to justify governmental licensing or other regulation. Recognition of a public interest, however, is neither recognition nor acknowledgement that the State is a partner in the business of horse racing . . . .[7]

Since amusement places were considered private enterprises,[8] the common law did not confer upon the general public the right to demand admission to such sites.[9] Accordingly, patrons were afforded limited redress for actions arising out of unjustified and arbitrary exclusions from racetracks. Their only remedy was a claim for possible breach of contract.[10]

As the gambling industry in general became more closely regu-

---

3. *Madden*, 296 N.Y. at 253, 72 N.E.2d at 698.

4. *See id.* at 255-56, 72 N.E.2d at 699. The distinction between licensees and franchise owners was one standard used to ascertain which individuals held enterprises clothed with a public interest. *See infra* notes 42-43 and accompanying text.

5. *See Madden*, 296 N.Y. at 249, 72 N.E.2d at 697; *Marrone*, 227 U.S. at 633; *Greenfeld*, 190 Md. 96, 57 A.2d 335 (1948); Garifine v. Monmouth Park Jockey Club, 29 N.J. 47, 148 A.2d 1 (1959). For jurisdictions still governed by the common law right to exclude patrons, see Tropical Park, Inc. v. Jock, 374 So. 2d 639 (Fla. Dist. Ct. App. 1979) (exclusion from racetrack), *cert. denied*, 383 So. 2d 1196 (Fla. 1980); Nation v. Apache Greyhound Park, 119 Ariz. 76, 579 P.2d 580 (1978) (dog racetrack).

6. Racetrack proprietors exercising a common law right to exclude patrons from racetracks could not contravene civil rights statutes. *See* Grannan v. Westchester Racing Ass'n, 153 N.Y. 449, 47 N.E. 896 (1897). A racetrack operator has "the power to admit as spectators only those whom he may select, and to exclude others solely of his own volition, as long as the exclusion is not founded on race, creed, color or national origin." *Madden*, 296 N.Y. at 253, 72 N.E.2d at 698.

7. *Madden*, 296 N.Y. at 255-56, 72 N.E.2d at 699.

8. *Id.* at 254, 72 N.E.2d at 699.

9. *But see infra* notes 65-66 and accompanying text.

10. Such instances would occur with the purchase of any admission ticket. *See infra* section I(B).

lated, several state legislatures[11] enacted statutes which changed the common law right to exclude patrons. Many state courts, however, have interpreted these statutes as mere codifications of the common law right.[12] This interpretation enabled proprietors to retain the right to exclude patrons arbitrarily by maintaining that gambling enterprises are private in nature. Recently, however, courts have construed such statutes to mean that these rights should be abrogated.[13] In *Uston v. Resorts International Hotel, Inc.*,[14] the New Jersey Supreme Court weighed a casino patron's right to admission against a proprietor's right to exclusion. The court held for the patron, thus obscuring the public/private distinction. The court lifted an injunction barring casino blackjack "system players,"[15] and stated that "the common law right to exclude is substantially limited by a competing common law right of reasonable access to *public* places."[16]

The need for statutory regulation of gaming establishments stems from the recognition that the gambling industry has both positive[17] and negative[18] aspects which integrally concern the pub-

---

11. *See generally infra* section II.

12. *See, e.g., infra* notes 76, 95-97 and accompanying text.

13. *See infra* notes 116-27 and accompanying text.

14. 89 N.J. 163, 445 A.2d 370 (1982). For a detailed discussion of *Uston*, see *infra* notes 139-47 and accompanying text. For a case study of *Uston*, see Note, *New Jersey's Casino Control Act and a Casino Patron's Right of Reasonable Access Prevent Casinos from Excluding Card Counters*, 28 VILL. L. REV. 451 (1983).

15. Casino blackjack system players are people who "keep track of the content of the deck [of cards] and vary their bet size and playing strategy accordingly." K. USTON, MILLION DOLLAR BLACKJACK 6 (1981). For a further discussion of system players, see E. THORP, BEAT THE DEALER: A WINNING STRATEGY FOR THE GAME OF TWENTY-ONE (1966). *See also infra* notes 136-47.

Kenneth Uston, a professional system player and the plaintiff in *Uston*, has been excluded from Nevada and Atlantic City, New Jersey casinos on several occasions. As a result, he became adept at self-disguise in order to penetrate the blackjack tables. When Uston initially was excluded in 1978 from Resorts International, an Atlantic City casino, Joseph P. Lordi, chairman of the New Jersey Casino Control Commission at the time, commented that Resorts was "free to develop its own standards." N.Y. Times, Feb. 1, 1979, at B2, col. 1. Uston offered a different interpretation: "Basically, it means [the casinos] reserve the right to exclude winners." *Id.*

16. *Uston*, 89 N.J. at 168, 445 A.2d at 372.

17. The gambling industry is an important revenue-raising device for participating states. In 1977, $819,201,638 in revenue was generated by the states where greyhound racing and horse racing are permitted. NATIONAL ASS'N OF STATE RACING COMM'RS, PARI-MUTUEL RACING 23 (1977). In 1980, New York State racetracks generated $256 million for state and local governments. JOINT LEGISLATIVE TASK FORCE TO STUDY & EVALUATE THE PARI-MUTUEL RACING INDUS. IN N.Y., THE RACING INDUSTRY IN NEW YORK STATE 2 (1981). For an example of the economic and social benefits of casino gambling, see *infra* note 174.

18. Direct correlations have been drawn between gambling and the corruptive elements

lic. Certain statutes contain an explicit legislative acknowledgment that these entities serve a vital public service.[19] Most of these statutes also contain fundamentally similar features,[20] yet have been subject to varying interpretations by the courts.[21]

The purpose of this Comment is to focus upon the contrasting levels of discretion that state legislatures afford racetrack and casino licensees[22] to exclude patrons, and to examine judicial treatment of such legislative grants. While the statutory enactments safeguard society from "corruptive elements,"[23] they invite arbitrary exclusions. These statutes contain discriminatory features and arguably are constitutionally "void for vagueness."[24] A tension thus emerges between a policy to maintain public confidence in the gambling industry through strict regulation,[25] and the threat of possible constitutional infringements. This Comment suggests that racetrack and casino proprietors should be held to a public calling standard in an effort to strike a better balance between these countervailing notions. The racetrack and casino industries are distinguishable from other places of amusement, since states are more heavily dependent upon the revenue that the former entities gen-

---

it attracts in society. For example, there has been a steady escalation of criminal activity in Atlantic City, New Jersey, since casino gambling was legalized in 1976. There were 4,391 criminal incidents reported in 1977; 5,738 in 1978; 7,010 in 1979; and 11,899 in 1980. R. ABRAMS, REPORT OF THE ATTORNEY GENERAL IN OPPOSITION TO LEGALIZED GAMBLING IN NEW YORK STATE 3 (1981).

19. *See, e.g., infra* notes 174-75 and accompanying text.

20. Generally, these statutes offer broad discretion to racetrack proprietors to exclude "undesirables" from the track. *See generally infra* text accompanying notes 75-127.

21. *Compare* Burrillville Racing Ass'n v. Garabedian, 113 R.I. 134, 318 A.2d 469 (1974) (common law right to exclude patrons was abrogated by statute) *with Apache Greyhound Park*, 119 Ariz. at 76, 579 P.2d at 580 (plaintiff incorrectly relied upon *Garabedian* since the Rhode Island statute merely codified the common law right to exclude).

22. For a definition of license, see *infra* note 42. It is the racetrack security personnel, rather than the owner, who exclude patrons. COMMISSION ON THE REVIEW OF THE NAT'L POLICY TOWARD GAMBLING, GAMBLING IN AMERICA 124 (1976) [hereinafter GAMBLING IN AMERICA]. For the purposes of this Comment, however, the discretion of the owners to exclude patrons will be discussed, since they ultimately are responsible for the actions of the guards.

23. *See infra* text accompanying note 106.

24. *See infra* section III(B).

25. *See, e.g.*, the Nevada Gaming Control Act, which states in relevant part: "Public confidence and trust can only be maintained by strict regulation of all persons, locations, practices, associations and activities related to the operation of licensed gaming establishments . . . ." NEV. REV. STAT. § 463.0129(1)(c) (1979).

erate,[26] and thus require greater state involvement and regulation. Accordingly, proprietors of these gambling enterprises should be held to a higher standard of care to the general public than should the "ordinary" proprietor of an amusement place.[27] As already mentioned, the *Uston* court held that casino gambling establishments should be held to a *public* standard.[28] Proprietors of such enterprises, therefore, "have a duty not to act in an arbitrary or discriminatory manner toward persons who come on their premises."[29]

This Comment also determines that statutory provisions which allow for the exclusion of "undesirable" people[30] are overbroad and potentially may be used to exclude individuals who pose no threat to the integrity of the gambling industry. This is evidenced by the exclusion in *Uston*, where the plaintiff was excluded merely because he consistently won money. The *Uston* court, perhaps foreseeing the danger of an expansive statutory interpretation, held that system players could only be excluded if the statute specifically provides for their exclusion.[31] Similarly, the language in most racetrack statutes is vague and potentially allows proprietors to expand the meaning of "undesirables" to unworkable proportions. In an attempt to avert such possibilities, this Comment proposes specific statutory reforms and remedies.

I. Common Law Right to Exclude Patrons

The distinction between public and private establishments was maintained at common law as a mechanism to dictate public policy. Proprietors of amusement places were afforded a great deal of discretion to exclude individuals because it was felt that the formers' interests "outweigh[ed] the comparatively slight interests of . . . [their] patrons."[32] The distinction was justified by the fact that proprietors of amusement places were mere licensees[33] of the

---

26. *See supra* note 17.

27. Gambling enterprises are more heavily regulated than, for example, amusement parks and theatres.

28. *See supra* text accompanying note 14.

29. *Uston*, 89 N.J. at 173, 445 A.2d at 375.

30. *See generally infra* text accompanying notes 116-27.

31. *Uston*, 89 N.J. at 175, 445 A.2d at 376.

32. *Garifine*, 29 N.J. at 55, 148 A.2d at 5.

33. *See infra* note 42 and accompanying text.

state and had no duty to "promote the public welfare."[34] This conferred upon racetrack owners the right to exclude patrons arbitrarily, which correspondingly limited judicial relief for aggrieved patrons.[35]

A. *Policy Motivations for the Public/Private Distinction*

The considerations motivating judicial restraint (with respect to redressing claims made by excluded patrons) rest with the notion that proprietors of private enterprises should not bear heavy burdens of proof, even if they act mistakenly. In *Garifine v. Monmouth Park Jockey Club*,[36] the plaintiff was denied admission to a racetrack because "his general record and reputation warrant[ed] his exclusion."[37] The court alluded to potential evidentiary proof problems by stating:

> [The racetrack] admittedly tended to attract many undesirables who could freely roam about its premises, and it was well-advised to be on the lookout for them and to bar them whenever possible. It would seem rather unwise to deter its cautionary efforts by judicial rulings placing heavy evidential burdens upon it . . . if perchance it acted mistakenly . . . .[38]

The *Garifine* court also pointed out that tort liability should not be imposed on a proprietor in the event he excludes an individual for a mistaken reason.[39] This insulated racetrack owners from liability arising from their employees' decisions to exclude customers.

In *Madden v. Queens County Jockey Club*,[40] the plaintiff had been mistakenly identified as a bookmaker and was denied injunctive relief against exclusion from a track; mere recognition of a public interest did not give rise to a viable civil claim. Racetrack proprietors retained "an absolute power to serve whom they pleased."[41] These businessmen were considered mere "licensees,"[42]

---

34. At common law, a proprietor had a duty to "promote the public welfare" if he was granted a state-created franchise. *Madden*, 296 N.Y. at 255, 72 N.E.2d at 699. *See infra* note 43 (discussion of the privileges and obligations attached to a conferred franchise).

35. *But see infra* section I(B) (discussion of contractual remedies at common law).

36. 29 N.J. 47, 148 A.2d 1 (1959).

37. *Id.* at 49, 148 A.2d at 2.

38. *Id.* at 54-55, 148 A.2d at 5. The *Garifine* court was discussing policy issues in reference to the decision in *Marrone*, 277 U.S. at 633.

39. *Garifine*, 29 N.J. at 55, 148 A.2d at 5.

40. 296 N.Y. 249, 72 N.E.2d 697, *cert. denied*, 332 U.S. 761 (1947).

41. *Id.* at 253, 72 N.E.2d at 698.

42. The *Madden* court defined license as

with no obligation to serve the general public. They were not granted franchises[43] by the state to perform a public purpose.

The common law did not distinguish between a proprietor's right to deny individuals entrance to his property and his right to eject forcibly[44] those who already had gained access to his premises.[45] The doctrine allowed the proprietor "to act 'for a bad reason or no reason at all.' "[46] In *Greenfeld v. Maryland Jockey Club*,[47] a racetrack proprietor refused to give "any just or lawful reason for ejecting" the appellant, and asserted his "right to so eject any patron at [his] pleasure 'without any cause or reason whatsoever.' "[48] Although the court conceded that the racetrack serves a " 'public or quasi public function in which the State participates directly,' "[49] it still maintained that the appellant was protected from arbitrary exclusion.

The proprietor's right to eject patrons forcibly is based upon the consideration that proprietors will act with "decent caution,"[50] and that the courts generally are unable to determine correctly whether or not a proprietor acted "reasonably" and in "good faith."[51] Justice Holmes, usually solicitous of citizens' rights,[52] felt it was wiser to promulgate an unpopular law than to submit to unreliable jury decisions:

> no more than a permission to exercise a pre-existing right or privilege which has been subjected to regulation in the interest of public welfare. The grant of a license to promote the public good, in and of itself, however, . . . neither renders the enterprise public nor places the licensee under obligation to the public.

Id. at 255, 72 N.E.2d at 699.

43. The *Madden* court defined franchise as

> a special privilege, conferred by the State on an individual, which does not belong to the individual as a matter of common right. . . . It creates a privilege where none existed before, its primary object being to promote the public welfare. . . . A familiar illustration is the right to use the public streets for the purpose of maintaining and operating railroads, waterworks and electric light, gas and power lines.

Id. (citations omitted).

44. *See infra* note 65 (distinction between exclusion and forcible ejection).

45. Greenfeld v. Maryland Jockey Club, 190 Md. 96, 57 A.2d 335 (1948).

46. *See* Conard, *The Privilege of Forcibly Ejecting An Amusement Patron*, 90 U. PA. L. REV. 809, 810 (1942).

47. 190 Md. 96, 57 A.2d 335 (1948).

48. *Id.* at 100, 57 A.2d at 336.

49. *Id.* at 99, 57 A.2d at 335.

50. Conard, *supra* note 46, at 820.

51. *Id.*

52. *See id.*

> [Justice Holmes] profoundly distrusted the jury. The rule that a proprietor might eject a patron was probably one of the 'rules of law based on less than universal considerations' which 'are made absolute and universal in order to limit those over refined speculations that we all deprecate.' He observed as an example of this principle, 'It is not thought worthwhile to let the right to build or maintain a barn depend upon the *speculations of a jury as to motives*'.[53]

The right to exclude patrons at common law perhaps can be viewed as an attempt to establish predictable standards for order and discipline in places of amusement. It has been argued that such places invariably attract more "undesirable" patrons[54] than a public place would attract. The common law rule thus provides proprietors with an effective weapon against these corruptive elements in society. It also eliminates a proprietor's burden of proving that each allegedly aggrieved patron was an "undesirable." The establishment of a per se rule, however, poses an intrinsic danger to patrons who may be ejected mistakenly. With some exceptions,[55] it permits proprietors to eject patrons without the fear of judicial intervention. Uniform application of this rule minimized the importance that courts have attached to a case-by-case factual inquiry in civil rights cases.[56] While proprietors were not always fully protected from liability arising from the forcible ejection of patrons,[57] many erroneously ejected patrons ultimately were limited to an action in breach of contract.

---

53. *Id.* at 819-20 (quoting Leroy Fibre Co. v. Chicago, Mil. & St. P. Ry., 232 U.S. 340, 353 (1914)) (Holmes, J., concurring) (emphasis original) (decision as to whether reasonable care was exercised to protect property set on fire due to railroad employees' negligence not a question for jury).

54. *See generally infra* text and accompanying notes 75-115 (conflicting interpretations of the term "undesirable").

55. *See infra* notes 64-66 and accompanying text.

56. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (person denied service in restaurant successfully advanced a state action argument). "Owing to the very 'largeness' of government, a multitude of relationships might appear to some to fall within the [Fourteenth] Amendment's embrace, but that, it must be remembered, can be determined only in the framework of the peculiar facts or circumstances present." *Id.* at 725-26.

57. *See* Planchard v. Klaw & Erlanger New Orleans Theatre Co., 166 La. 235, 117 So. 132 (1928) (plaintiff recovered $500 for "insult and maltreatment" when theatre usher and police officer forcibly excluded him). *See also* Conard, *supra* note 46, at 810-11.

B. *Proprietor/Patron Contractual Relationship at Common Law*

An admission ticket to a place of amusement generally was considered a revocable license at common law.[58] A ticket purchase did not create an inherent contractual relationship between the proprietor and patron. This allowed a proprietor to terminate the contract at any time. The common law rule was adopted from an English case, *Wood v. Leadbitter*,[59] which held that a ticket purchase did not create a right "in rem."[60] In *Wood*, the plaintiff was removed from a racecourse without a refund of the admission fee because of alleged past misdeeds. The court additionally denied recovery in an action in assault and false imprisonment and held that a proprietor may exclude without cause, despite the fact that the patron had purchased a ticket.[61]

In situations where a patron is excluded forcibly, American courts have allowed for the refund of the price of an admission ticket in breach of contract actions. In *Marrone v. Washington Jockey Club*,[62] where a patron was prevented forcibly from entering the track premises for allegedly drugging a horse, the court held:

> A contract binds the person of the maker but does not create an interest in the property that it may concern, unless it also operates as a conveyance. The ticket was not a conveyance of an interest in the race track, not only because it was not under seal but because by common understanding it did not purport to have that effect.[63]

While the courts generally held that the purported effect of a ticket-contract does not create an interest in a place of amusement for patrons, this did not free proprietors entirely from liability for

---

58. *See Marrone*, 227 U.S. at 633; Shubert v. Nixon Amusement Co., 83 N.J.L. 101, 83 A. 369 (1912); Woollcott v. Shubert, 217 N.Y. 212, 111 N.E. 829 (1916); Boswell v. Barnum & Bailey, 135 Tenn. 35, 185 S.W. 692 (1916); Finnessey v. Seattle Baseball Club, 122 Wash. 276, 210 P. 679 (1922). *But see* Hurst v. Picture Theatres, [1915] 1 K.B. 1 (C.A.) (theatre proprietor has no right to exclude patron who was behaving properly).

59. 13 M. & W. 838, 153 Eng. Rep. 351 (Ex. 1845). *Wood* was expressly overruled in England by *Hurst*, 1 K.B. at 1.

60. In rem literally means "against the thing." "An 'action in rem' is a proceeding that takes no cognizance of owner but determines the right in specific property against all of the world, equally binding on everyone." Flesch v. Circle City Excavating & Rental Corp., 137 Ind. App. 695, 698, 210 N.E.2d 865, 868 (1965).

61. *Wood*, 13 M. & W. at 838, 153 Eng. Rep. at 351.

62. 227 U.S. 633 (1913).

63. *Id.* at 636.

their torts.[64] For example, the court in *Boswell v. Barnum & Bailey*[65] stated that although a customer's ticket is a revocable license, an action in tort could be maintained if excessive force and insulting language is used during his expulsion from the premises. Such potential liability compelled owners to exercise reasonable discretion when ejecting individuals. In effect, then, the proprietor's privilege at common law to eject people arbitrarily through the use of excessive force or incivility was not absolute.[66] If the patron was "improperly" ejected or excluded, the proprietor might be liable in tort.

The racetrack owner's right to exclude patrons was also affected by existing relevant statutes.[67] In *Greenberg v. Western Turf Association*,[68] the plaintiff, who published a daily racing form, was denied access to the defendant's track on numerous occasions. The defendant racetrack proprietor appealed from a trial court holding for the plaintiff, alleging the unconstitutionality of a California statute.[69] This statute made it unlawful to refuse admission to any place of amusement to anyone under twenty-one years of age, unless such person was intoxicated, boisterous or of "lewd or immoral character."[70] The California Supreme Court affirmed the trial court's judgment, finding that the statute was constitutional since it was within the state's police powers to regulate places of amusement.[71] The decision was affirmed by the United States Supreme Court, where Justice Harlan stated:

> It is neither an arbitrary exertion of the State's inherent or governmental power, nor a violation of any right secured by the Constitution of the United

---

64. *But see supra* text accompanying note 39.

65. 135 Tenn. 35, 185 S.W. 692 (1916). There is a distinction between the "ejection of a patron," as in *Boswell*, and the "exclusion" of a patron. "Ejection is the act of removing a person from the premises. Exclusion denies entrance." J. HUMPHREYS, RACING LAW 207 (1963).

66. *See* Conard, *supra* note 46, at 823. Conard believes that the rule is not genuine because "common sense asks whether proprietors actually put out customers in violation of contract, and without even an honest belief of facts which would constitute good cause." *Id.* at 810. However, numerous cases indicate that patrons have been forcibly ejected without cause. *See, e.g., Marrone*, 227 U.S. at 633.

67. Many jurisdictions did not have statutes governing the exclusion of patrons from places of amusement when the earlier exclusion cases arose. *See generally* cases cited *supra* note 58.

68. 148 Cal. 126, 82 P. 684 (1905), *aff'd* 204 U.S. 359 (1907).

69. *Id.* at 127, 82 P. at 684.

70. Greenberg v. Western Turf Ass'n, 140 Cal. 357, 73 P. 1050 (1903).

71. *Greenberg*, 148 Cal. at 128, 82 P. at 685.

> States. The race-course in question being held out as a place of public entertainment and amusement is, by the act of the defendant, so far affected with a public interest that the State may, in the interest of good order and fair dealing, require defendant to perform its engagement to the public, and recognize its own tickets of admission in the hands of persons entitled to claim the benefits of the statute. That such a regulation violates any right of property secured by the Constitution of the United States cannot, for a moment, be admitted. The case requires nothing further to be said.[72]

The *Greenberg* holding ran contrary to the generally accepted common law right to exclude individuals, and thus placed a limitation on the proprietor's powers. The patron's right against arbitrary exclusion outweighed the burden imposed upon the proprietor to prove that the patron was "undesirable." State statutes similar to the California statute were drafted subsequent to *Greenberg*, yet they granted racetrack proprietors the sole discretion to exclude "undesirable" patrons without cause.[73] These statutory enactments, therefore, ultimately were a restatement of the common law[74] and did not alter a racetrack owner's right to exclude patrons arbitrary.

II. Statutory Enactments: Abrogation or Mere Codification of the Common Law?

In several jurisdictions, state statutes have altered the level of discretion afforded racetrack licensees to exclude people at common law.[75] Various courts have interpreted such statutes as a restatement or codification of the common law doctrine.[76] Some courts, however, have interpreted these laws as an abrogation of the right to exclude patrons arbitrarily.[77] This is evidenced not

---

72. Western Turf Ass'n v. Greenberg, 204 U.S. 359, 364 (1907).

73. For a discussion dealing with statutory enactments as a codification of the common law, see *infra* notes 76-114 and accompanying text.

74. *See id.*

75. *See generally infra* section II(B).

76. *See, e.g.*, Nation v. Apache Greyhound Park, 119 Ariz. 76, 78, 579 P.2d 580, 582 (1978), where appellant relied upon a Rhode Island statute (*see infra* note 77 for statute) purportedly requiring a showing that the patron was "undesirable." The court dispensed with this argument, reasoning that the Rhode Island statute, affording discretion to the "sole judgment of said licensee," was only a codification of the common law. 119 Ariz. at 76, 579 P.2d at 582.

77. *See, e.g.*, Narragansett Racing Ass'n v. Mazzaro, 116 R.I. 1354, 357 A.2d 442 (1976). *Mazzaro* held that a patron was protected statutorily from arbitrary exclusion. A showing of good cause, in addition to a showing that the patron was "undesirable," is required for the racetrack to exclude a patron permanently. The *Mazzaro* decision was a restatement of the

only in cases dealing with exclusions from racetracks, but also in cases which place limitations on a licensee's right to deny certain patrons access to gambling casinos. In *Uston v. Resorts International Hotel, Inc.*,[78] for example, the court expressly held that casinos are public places and that proprietors have a duty not to exclude people arbitrarily. The existing dilemma, then, is that most state statutes express strikingly similar language, yet are subject to differing jurisdictional interpretations.

A. *Statutory Treatment of "Undesirable" People*

The fact that "[u]ndesirable persons who have entered gambling and given it a bad name can be forced out"[79] has been advanced as a positive aspect of legalized gambling.[80] The reasoning follows that legalized gambling establishments can serve as a disincentive to the formation of illegal operations. While such criminal behavior can be curtailed through strict regulations,[81] problems arise in determining who falls within the definition of "undesirable," and in deciding how the activities of the "undesirables" should be regulated.

It is generally accepted that the state has an interest in excluding certain classes of individuals from racetracks which pose a criminal and/or monetary threat to the horse racing industry[82]—among these classes are bookmakers and race-fixers. Difficulties arise, however, when individuals do not fall within a distinct classification, and proprietors are afforded by statute unlimited discretion to exclude them. A balance between the state's interests and those of excluded individuals must be analyzed, therefore, in an effort to deal with exclusion cases which lie within the penumbra.

---

holding in *Garabedian*, 113 R.I. at 134, 318 A.2d at 469, but added that the statute was a clear abrogation of the common law right to exclude. The Rhode Island statute states:

> *Ejection of undesirable persons—Rights of licensee.* Any licensee hereunder shall have the right to refuse admission to and eject from the enclosure of any pari-mutuel facility where a pari-mutuel meeting . . . is being held, any person or persons whose presence within said enclosure is, in the sole judgment of said licensee, its agents or servants, undersirable [sic].

R.I. GEN. LAWS § 41-3-17 (1969).

78. 89 N.J. 163, 445 A.2d 370 (1982).

79. THE COUNCIL OF STATE GOVERNMENTS, GAMBLING: A SOURCE OF STATE REVENUE 32 (1973).

80. *Id.*

81. *See supra* note 25.

82. *See supra* notes 17-18.

If racetrack proprietors had to prove that every excluded person would actually engage in some unlawful activity had the latter not been excluded, they would constantly face frivolous lawsuits.[83] On the other hand, statutory interpretations favoring unlimited discretion to exclude people could give rise to potential constitutional violations.[84]

1. *Excluded racetrack bookmakers.* The state has a monetary interest in barring bookmakers[85] from racetracks. When a bookmaker places an illegal bet for an individual, in essence he is channelling away revenue that would have been received by a racetrack, and is reducing the likelihood that winnings will be reported for income tax purposes. Since the state retains a taxable portion of racetrack revenue,[86] the money it derives from this revenue is diminished significantly by extensive bookmaking activity.[87]

The New York Court of Appeals dealt with the exclusion of a convicted bookmaker in *People v. Licata.*[88] In *Licata*, the defendant received written notice " 'not to enter or remain at any time' upon the premises of the track,"[89] yet he tried to gain entry four months later. Judge Jasen upheld a conviction for criminal tres-

---

83. *Apache Greyhound Park*, 119 Ariz. at 78, 579 P.2d at 582.

84. *See infra* section III.

85. The notion of bookmaking emerged sometime around the year 1800. The bookmaker was "dedicated to the proposition that a majority of other gamblers more likely than not will lose." R. SASULY, BOOKIES & BETTORS 14 (1982). He would accept bets illegally from those in the general public on horse races:

> On one side stood the backer, the person who liked the chances of a horse well enough to register his opinion with a bet. Facing him was the bookmaker (or blackleg, or simply leg), clearly not a gentleman, who laid his money against the horse's chances. The backer, who wagered that a horse would win, stood in the ancient tradition, backing his opinion about the speed of the horse. The bookmaker acted on a new concept: he made his own judgment, not merely about the horse but also about the worth of the bettor's opinion. In addition, he offered different odds on the chances of different horses. He thus tempted a backer to wager on a lightly regarded horse, and, at the same time, the varying odds made it possible for the bookmaker to make a profit (given enough bettors or, as would be said today, enough action) no matter which horse won.

Id. at 15 (parentheticals original).

86. *See supra* note 17.

87. Bookmakers comprise a major portion of people excluded from racetracks. The fifty-five member tracks of the Thoroughbred Racing Association excluded 1661 patrons for illicit bookmaking activities between November 1973 and August 1974. GAMBLING IN AMERICA, *supra* note 22, app. 3, at 133.

88. 28 N.Y.2d 113, 268 N.E.2d 787, 320 N.Y.S.2d 53 (1971).

89. *Id.* at 114, 268 N.E.2d at 788, 320 N.Y.S.2d at 54.

pass,[90] based upon a regulation barring "undesirables."[91] The regulation imposed a burden upon licensees to screen people at the racetrack carefully.[92] The defendant argued that his ticket purchase created a binding contract and thus nullified the existing exclusion order. The court, however, held that this view weighed heavily against policy considerations and would prevent effective enforcement of regulations.[93]

An additional policy concern deals with the question of whether a banned patron, convicted of bookmaking several years earlier, can assert that his exclusion was based upon a "stale claim."[94] In *Epstein v. California Horse Racing Board*,[95] the California District Court of Appeal denied an individual permission to

---

90. Criminal trespass in the third degree, a violation, was amended to read merely "Trespass" in 1971, apparently to reinforce the noncriminal nature of the offense; the text of the statute remained the same. *See* N.Y. PENAL LAW § 140.05 Practice Commentary (McKinney 1975). Section 140.05 reads: "Trespass. A person is guilty of trespass when he knowingly enters or remains unlawfully in or upon premises." Section 140.00(5) states: " A person 'enters or remains unlawfully' in or upon premises when he is not licensed or privileged to do so."

91. N.Y. ADMIN. CODE tit. 9, § 4003.46 (1983) states:

> *Undesirable persons to be ejected.* No person who is known or reputed to be a bookmaker or a vagrant within the meaning of the statutes of the State of New York, or a fugitive from justice, or whose conduct at a racetrack in New York or elsewhere, is or has been improper, obnoxious, unbecoming or detrimental to the best interests of racing, shall enter or remain upon the premises.

92. *Licata*, 28 N.Y.2d at 115, 268 N.E.2d at 788, 320 N.Y.S.2d at 55.

93. *Id.* at 116-17, 268 N.E.2d at 789, 320 N.Y.S.2d at 56. Judge Jason stated that:

> Relevant policy considerations would also seem to weigh heavily in the result we reach. The State Racing Commission regulation is explicit that 'No person who is known or reputed to be a bookmaker . . . *shall enter* . . . upon the premises of any licensed . . . race meeting' (emphasis added). To hold that the sale of a ticket revokes an existing lawful order 'not to enter,' would prevent effective enforcement of the commission's regulation barring certain undesirable persons from racetracks. Under such an interpretation, an undesirable person would never be subject to criminal prosecution for violating the 'not to enter' order, but would merely risk expulsion from the racetrack upon discovery on the premises. This, in our view, would place an unreasonable burden upon the track officials in enforcing a reasonable and desirable policy of our State.

Id. (citation omitted) (parenthetical original).

94. A stale claim is a demand that

> has long remained unasserted, one that is first asserted after an unexplained delay which is so long as to render it difficult or impossible for the court to ascertain the truth of the matters in controversy and do justice between the parties, or as to create a presumption against the existence or validity of the claim, or a presumption that the claim has been abandoned or satisfied.

Luschen v. Stanton, 192 Okla. 454, 459, 137 P.2d 567, 572 (1943).

95. 222 Cal. App. 2d 831, 35 Cal. Rptr. 642 (1963).

engage in pari-mutuel wagering,[96] based upon a twenty-four year old bookmaking conviction.[97] In reversing a superior court decision, the court found that the California Racing Board did not abuse its discretion by excluding the patron.[98] Although the connection between his conviction and exclusion appeared to be attenuated by a significant time span, the court considered other factors in its determination—the patron was arrested for "past posting"[99] in 1950, was "laying off" money[100] thereafter, made hundreds of recent telephone calls to reputed gamblers, and was evasive when questioned at the board's hearing.[101]

The exclusion of "improper or objectionable persons" was held to be consistent with public policy interests in a Louisiana case where the court denied a convicted bookmaker access to a racetrack.[102] Although this statutory language appears to be vague and overbroad, the term "improper and objectionable" has "acquired a definite and recognized meaning . . . [which includes] a person who has been convicted of bookmaking."[103] The court noted that

---

96. "The essence of the pari-mutuel system of betting is that bettors wager against one another instead of against a bookmaker." GAMBLING IN AMERICA, *supra* note 22, at 107. The majority of pari-mutuel wagering is conducted at dog and horse racetracks. *Id.* at 105.

97. CAL. BUS. & PROF. CODE § 19572 (West 1964) states: *Exclusion from tracks of undesirable persons: regulation* "The board may . . . [exclude] any known bookmaker, . . . or any other person whose presence in the inclosure would, in the opinion of the board, be inimical to the interests of the State or of legitimate horseracing, or both."

98. *Epstein*, 222 Cal. App. 2d at 845, 35 Cal. Rptr. at 651. There must be a "clear abuse of discretion" to contradict a finding of the board. *Id.* at 855, 35 Cal. Rptr. at 651.

99. Past posting is a method of illegal wagering in which a person knows the result of a race before placing a bet with a bookmaker. *Id.* at 842, 35 Cal. Rptr. at 649.

100. When a bookmaker accepts "heavy" bets on a horse, he stands to lose a considerable amount of money if the horse wins. The bookmaker protects himself by laying off with a man who performs an underwriter function. *Id.* at 842, 35 Cal. Rptr. at 649. The bookmaker needs, among other things, "a means of rapid out-bound communication, usually the telephone, with other bookmakers or persons financing bookmakers, in order to balance his book and protect against severe loss when the betting becomes heavy on any particular entry. This hedging process is known as the laying off of bets." R. SASULY, *supra* note 85, at 123-24. This activity was commented upon in Flores v. Los Angeles Turf Club, Inc., 55 Cal. 2d 736, 361 P.2d 921, 13 Cal. Rptr. 201 (1961).

101. *Epstein*, 222 Cal. App. 2d at 842-45, 35 Cal. Rptr. at 649-51.

102. Bonamo v. Louisiana Downs, Inc., 337 So. 2d 553 (La. 1976) (patron excluded from racetrack less than one year after his bookmaking conviction). *Bonamo* construed LA. REV. STAT. ANN. § 4:172(d) (West 1973) ("[t]he stewards shall order ejected from the grounds of the association any improper or objectionable persons").

103. *Id.* at 559. The state of Florida has a similar statute, which states:

> No person who is a bookmaker, or who is known or reputed to be a bookmaker, or who is a vagrant within the meaning of the laws of Florida, or who is a fugi-

bookmakers must be excluded "to successfully operate and to maintain public confidence."[104] The state, however, has an equally compelling interest in regulating race-fixers.[105]

2. *Excluded race-fixers.* In addition to the state's need to raise revenue from the racing industry, there is a corresponding need to maintain the integrity of the sport of horse racing. It is established public policy that "the gaming industry [be] . . . free from criminal and corruptive elements."[106] To accomplish this goal, it is essential that race-fixing activity be curtailed.

The problem of race-fixing was dealt with in *Presti v. New York Racing Association,*[107] where a broker who sold and purchased racehorses was excluded from a racetrack for allegedly conspiring to enter horses in races under the guise that they were owned by other people. He argued that access to the track was "critical" for him to conduct his business properly.[108] An injunction against exclusion was granted at Special Term, which concluded that while there was "an obligation to exclude undesirables," this was "subject to review by the Courts, which may determine whether [such exclusions] are arbitrary or capricious."[109] The Appellate Division of the Supreme Court reversed, stating that this inquiry is limited to the exclusion of licensed people,[110] such as an owner or trainer. Since the broker was not licensed, the

---

tive from justice, or whose conduct, on or off a racetrack or fronton premises located in Florida or elsewhere, now or heretofore, has been improper, obnoxious, unbecoming or detrimental to the best interests of racing, shall enter or remain upon the premises of any licensee.

FLA. STAT. § 7e-1.05 (15) (1983). *See* Mones v. Austin, 318 F. Supp. 653 (S.D. Fla. 1970) (Florida statute barring convicted bookmakers from racetracks upheld as bearing reasonable relationship to legitimate state objective and was not violative of equal protection clause); *see also* Tropical Park v. Jock, 374 So. 2d 639 (Fla. 1979) (a pari-mutuel owner's common law right to exclude a patron because of his known underworld connections is not abrogated by any Florida statute).

104. *Bonamo,* 337 So. 2d at 555-56.

105. A race-fixer is a person who enhances his chances that a particular horse will win a race through illegal methods. For example, illegal injections of certain drugs into a horse will help him run faster. For a discussion of race-fixing, see R. SASULY, supra *note 85.*

106. NEV. REV. STAT. § 463.0129(1)(b).

107. 46 A.D.2d 387, 363 N.Y.S.2d 24 (1975). The *Presti* decision rests upon the holding of Jacobson v. New York Racing Ass'n, Inc., 33 N.Y.2d 144, 305 N.E.2d 765, 350 N.Y.S.2d 639 (1973) (exclusion of horse owner and trainer).

108. *Presti, 46 A.D.2d at 388, 363 N.Y.S.2d at 25.*

109. *Id.* at 389-90, 363 N.Y.S.2d at 26-27.

110. *Id.* at 390, 363 N.Y.S.2d at 27.

racetrack proprietor justifiably exerted his common law right to exclude patrons.[111]

In the New Jersey case of *Bishop v. New Jersey Sports & Exposition Authority*,[112] the court denied the plaintiff admission to the Meadowlands Racetrack, based upon the individual's federal conviction for race-fixing in Maryland. This activity was deemed to be "conduct detrimental to racing or the public welfare"[113] under New Jersey regulations. While the regulations do not mention criminal convictions specifically as grounds for exclusion,[114] the decision appears to be consistent with the policy to bar people engaged in criminal conduct relating to horse racing.

It is clear that strict regulatory standards must be imposed if the racing industry is to be safeguarded from criminal influences, such as race-fixing and bookmaking. Recent cases from several jurisdictions,[115] however, question whether proprietors of places of amusement should retain unlimited discretion in determining which of their patrons are "undesirable" people.

3. *Abrogation of common law right to exclude.* An inherent contradiction is present in most of the statutory enactments mentioned above. While they seemingly limit arbitrary exclusion by requiring a finding that a patron is "undesirable," the courts grant unlimited discretion to racetrack licensees in making such a finding. In the absence of specific guidelines characterizing "undesirable" people, most courts are reluctant to abrogate the common law right of exclusion.[116]

In Rhode Island, however, the state legislature changed the common law right to exclude.[117] The statute initially was interpreted by the Rhode Island Supreme Court in 1974 to require "that a determination be made that the person to be ejected or excluded is an undesirable person whose presence is inconsistent

111. *Id.*

112. 168 N.J. Super. 533, 403 A.2d 934 (1979).

113. *Id.* at 535, 403 A.2d at 935 (quoting N.J. ADMIN. CODE § 13-70-1.17(a) (1980)).

114. Certain state statutes deem such convictions as grounds for exclusion. *See, e.g., infra* note 125.

115. *See infra* notes 116-27 and accompanying text.

116. *See* James v. Churchill Downs, Inc., 620 S.W.2d 323, 325 (Ky. Ct. App. 1981) (no intent behind statute to abrogate proprietor's common law right to exclude an "undesirable" from track).

117. R.I. GEN. LAWS § 41-3-17 (1969). *See supra* note 77.

with the orderly and proper conduct of the racing program."[118] Subsequently, the court interpreted the statute to require a showing of "good cause," in addition to a showing that the person was "undesirable," for an individual to be excluded permanently.[119] Ironically, though, the Rhode Island statute closely resembles those from other jurisdictions which do not abolish common law exclusion.

The Supreme Court of New Hampshire also proscribed the common law rule when it held in *Tamelleo v. New Hampshire Jockey Club, Inc.*[120] that denial of access for patrons could not be "arbitrary." The New Hampshire statute granted "any licensee . . . the right to refuse admission to . . . any person or persons whose presence within said enclosure is in the sole judgment of said licensee inconsistent with the orderly and proper conduct of a race meeting."[121] The court interpreted " 'sole judgment' to mean that the judgment cannot be exercised in a capricious, arbitrary or unreasonable manner."[122]

A conflict arises between the burden on racetrack owners to screen "undesirables" (*Licata*),[123] and the unlimited discretion to exclude people at common law (*Presti*).[124] This problem is evident when examining, for example, the relevant New York regulations.[125] These regulations enumerate "undesirable" acts yet also

---

118. *Garabedian*, 113 R.I. at 138, 318 A.2d at 472 (statute took the place of the common law rule, although patron's exclusion was upheld).

119. *Mazzaro*, 116 R.I. at 354, 357 A.2d at 442 (excluded patron allowed to enter racetrack premises). For a case prior to *Mazzaro* in which an individual was admitted to a racetrack (but with common law right to exclude remaining intact), see Burrillville Racing Ass'n v. Mello, 107 R.I. 669, 270 A.2d 513 (1970). For a Pennsylvania case which recognized abrogation of the common law, see Rockwell v. Pennsylvania State Horse Racing Comm'n, 15 Pa. Commw. 348, 327 A.2d 211 (1974). However, the relevant statutory provisions were repealed by the Race Horse Industry Act, ch. 4, 1981 Pa. Laws 435, no. 135 § 401(b). It is, therefore, presently unclear what the state of the law is.

120. 102 N.H. 547, 550, 163 A.2d 10, 13 (1960). The court, while disallowing arbitrary exclusions, still upheld the common law right to exclude.

121. N.H. REV. STAT. ANN. § 284:39 (1977).

122. *Tamelleo*, 102 N.H. at 550, 163 A.2d at 13.

123. *See supra* notes 88-93 and accompanying text.

124. *See supra* notes 107-11 and accompanying text.

125. N.Y. ADMIN. CODE tit. 9, § 4119.8 (1974) states in relevant part:

> *Undesirable persons.* Any person whether a licensee, participant or patron whose conduct is deemed detrimental to the best interests of harness racing or who is deemed an undesirable person may be expelled from the track. . . . Acts deemed undesirable shall consist of, but not be limited by, the following:
>
> (a) bookmaking or other illegal wagering or gambling;

state that *nothing* diminishes the right to exclude a patron without reason.[126] While there appears to be a concern to discriminate only against "undesirables," licensees are still afforded the right to ban any patron arbitrarily. In essence, these regulations, while facially purporting to abrogate this common law right to exclude people, merely reiterate it.

The state's concern with ridding gambling of corruptive elements justifies strict regulation of the racing industry. However, the governing statutes are overbroad and conceivably could extend to the "ordinary" patron, who the statutes are designed to protect. This possibility is further evidenced by cases which deal with the "blacklisting" of certain individuals from casino establishments.[127]

B. *Blacklisting of Casino "Card Counters"*

In the United States, legalized casino gambling exists only in the state of Nevada[128] and in Atlantic City, New Jersey.[129] As is the case with horse racing, each state has a commission which imposes strict standards upon proprietors seeking gambling licenses.[130] These commissions additionally possess the discretionary power to exclude patrons from casinos by placing their names on a blacklist.[131] While it has been argued that such exclusionary lists

---

(b) touting [placing bets for others, while expecting compensation];
(c) creating or continuing a public disturbance;
(d) disorderly conduct;
(e) associating with undesirables; [and]
(f) transmitting information to points outside the track. . . .
. . . .
. . . In addition a person who has been convicted of a crime involving moral turpitude, or who has been convicted of bookmaking or other forms of illegal gambling . . . shall be subject to expulsion as provided in this section. *Nothing contained in this section shall diminish the right of any track to exclude any person as a patron or otherwise without reason* provided such exclusion is not based upon race, creed, color or national origin [emphasis added].

126. *See id.*

127. *See infra* section II(B).

128. *See* Nevada Gaming Control Act, NEV. REV. STAT. ch. 463 (1981).

129. *See* Casino Control Act, N.J. STAT. ANN., ch. 12 (West Supp. 1983-1984).

130. N.J. STAT. ANN. §§ 5-12-84 to 86 (West Supp. 1983-1984) (licensing standards set forth by the Casino Control Comm'n); NEV. REV. STAT. §§ 463.170-.172 (1981) (licensing standards governed by the Nevada Gaming Comm'n).

131. NEV. REV. STAT. § 463.151(3)-(4) (1981) allows state regulatory agencies to exclude (blacklist) certain individuals from the casinos:

(3) In making that determination, the board and the commission may consider any:

(a) Prior conviction of a crime which is a felony in this state or under the laws of the United States, a crime involving moral turpitude or a violation of the gaming laws of any state;

(b) Violation or conspiracy to violate the provisions of this chapter relating to:

(1) The failure to disclose an interest in a gaming establishment for which the person must obtain a license; or

(2) Willful evasion of fees or taxes;

(c) Notorious or unsavory reputation which would adversely affect public confidence and trust that the gaming industry is free from criminal or corruptive elements; or

(d) Written order of a governmental agency which authorizes the exclusion or ejection of the person from an establishment at which gaming or pari-mutuel wagering is conducted.

(4) Race, color, creed, national origin or ancestry, or sex must not be grounds for placing the name of a person upon the list.

Nevada regulation, NEV. ADMIN. CODE § 28.010(3) (1980), defines a "notorious or unsavory person" as someone who can be established through identification of his criminal activity found in published federal and state legislative reports.

N.J. STAT. ANN. § 5:12-71(a) (West Supp. 1983-1984) states that the Gambling Commission may provide, by regulation, for the exclusion of people:

(1) Who are career or professional offenders . . . ;

(2) Who have been convicted of a criminal offense under the laws of any state or of the United States, which is punishable by more than 6 months in prison, or of any crime or offense involving moral turpitude; or

(3) Whose presence in a licensed casino would, in the opinion of the commission, be inimical to the interest of the State of New Jersey or of licensed gaming therein, or both.

The first major challenge to casino blacklisting was made in Marshall v. Sawyer, 301 F.2d 639 (9th Cir. 1962), *aff'd on other grounds*, 365 F.2d 105 (9th Cir. 1966), *cert. denied*, 385 U.S. 1006 (1967). The plaintiff, blacklisted for his criminal activity, was ejected forcibly from a Las Vegas casino. He did not contest that he was an "undesirable," as defined by Nevada regulations. He argued that the blacklisting procedure deprived him of the right to be free from arbitrary and unreasonable classification as guaranteed by the fourteenth amendment. 365 F.2d at 112. The court proceeded on "the assumption that the regulation is valid" and that the plaintiff was not deprived of "any constitutionally-guaranteed right." *Id.* at 113.

The most recent Nevada case concerning blacklisted casino patrons is Spilotro v. State, *Ex rel.* Nev. Gaming Comm'n, 99 Nev. ____, 661 P.2d 467 (Nev. 1983). In *Spilotro*, the plaintiff was placed on a blacklist, although the Nevada Gaming Commission

did not make any findings of basic fact to support its ultimate findings that Spilotro possessed a notorious and unsavory reputation, had been convicted of crimes that would be felonies if committed in Nevada or under federal law, and was a person whose presence in a licensed gambling establishment would be inimical to the interests of the State and the licensed gaming industry. Thus the Commission made absolutely no attempt to comply with the dictates of NRS 463.312(18).

Id. at ____, 661 P.2d at 469. While the court held that Nevada statutes authorizing a blacklist neither constituted a bill of attainder nor deprived Spilotro of any constitutional rights (*id.* at ____, 661 P.2d at 470, 471), the case clearly illustrates that patrons cannot be excluded arbitrarily from Nevada casinos.

are "bills of attainder,"[132] administrative and judicial relief are available after exclusion.[133] In addition, most of the individuals designated on these lists are associated with criminal activity.[134] However, major policy questions arise when a patron is placed on a blacklist for reasons other than his criminal involvement. Such is the case with the blacklisting of professional card counters from playing blackjack.[135]

On the federal level, Uston v. Hilton Hotels Corp., 448 F. Supp. 116 (D. Nev. 1978), held that the exclusion of a card counter did not give rise to a state action claim. Currently, however, a similar constitutional challenge to the Nevada blacklisting statutes and regulations is pending in the Ninth Circuit Court of Appeals. Letter from John A. Godfrey, Deputy Att'y Gen., Nevada Gaming Div., to Perry Z. Binder (Dec. 10, 1982).

132. *See* Note, *State Regulation of Casino Gambling: Constitutional Limitations and Federal Labor Law Preemption*, 49 FORDHAM L. REV. 1038, 1042-48 (1981). A bill of attainder is a legislative act which punishes people placed on a list without a judicial trial. *Id.* at 1042 & n.28; *See* U.S. CONST. art. I, § 9, cl. 3.

133. *See* N.J. STAT. ANN. § 5:12-71(f); NEV. REV. STAT. § 463.153(1).

134. Public policy concerns regarding corruptive elements have been clearly expressed. *See supra* text accompanying note 106. *See also* NEV. REV. STAT. § 463.0129(1)(b) (it is a stated policy objective to maintain public confidence and trust "that the gaming industry is free from criminal and corruptive elements").

Currently, there are approximately sixty names on the New Jersey blacklist. Most of these individuals were convicted in local court for cheating in a casino. Letter from Ben A. Borowsky, Public Info. Off., Casino Control Comm'n, to Perry Z. Binder (Dec. 7, 1982). As of 1980, Nevada had twelve individuals on its list, all for criminal activity in organized crime. *Oversight of Labor Dep't Investigation of Teamsters Central State Pension Fund: Hearings before Perm. Subcomm. on Investigation of the Comm. on Governmental Aff.*, 96th Cong., 2d Sess. 173-87 (1980).

135. *See* Rose, *The Legalization and Control of Casino Gambling*, 8 FORDHAM URB. L.J. 245, 277 n.171 (1980). "Blackjack, also called 21, is a card game in which a player wins if the total value of his hand is closer to 21 than the dealer's total." N.Y. Times, Feb. 1, 1979, at B2, col. 2. A professional card counter

> determines whether the undealt part of the deck is rich in high cards. If so, he knows that the chances are good that the dealer will draw a high card that will make the dealer's hand go over 21 if he is drawing with a hand worth 16 or less. Then the counter can "stand pat" even with a very low total.
>
> Against a dealer's 17, for example, a counter "seeing" a deck of high cards knows that he is likely to outscore the dealer if he is drawing to a total of no more than 11. In either case, he might make the maximum bet allowed. If the deck has few high cards, the counter might make the minimum bet.

Id.

Although Nevada regulations only allow for the blacklisting of recognized criminal figures (*supra* note 131) approximately one-half of Nevada casinos employ the private services of the Griffin Detective Agency which maintains its own "Mug Book." *See* K. USTON, MILLION DOLLAR BLACKJACK, *supra* note 15, at 263. The Mug Book (or "brown book") is a dossier of cheaters *and card counters*. *Id.* Aside from these records, Griffin circulates fliers to casinos if a card-counting team is detected. *Id.*

Kenneth Uston, the author of *Million Dollar Blackjack* and a professional card counter,

An expert card counter is a person who can achieve a statistical advantage while playing blackjack.[136] This is accomplished by rapidly calculating the shifting probabilities of winning a bet after the card dealer exposes each card.[137] A discussion of the blacklisting of casino card counters is germane to this Comment because it provides a prime example of a proprietor's use of a gambling statute to exclude people who pose no criminal threat to the industry.[138] It is important to the analysis of what constitutes an "undesirable" person, and raises the issue of whether a person can be denied access to a gaming establishment if he finds a way to legally "beat the system."

The issue of blacklisting casino card counters arose in *Uston v. Resorts International Hotel, Inc.*[139] Kenneth Uston, a renowned blackjack strategist,[140] was excluded from a casino after a new commission rule dramatically increased card counters' odds of winning.[141] The court held that patrons have "a common law right of

---

argues that these private listings are illegal. *Id.* One of the constitutionally questionable admonitions in the Mug Book to which he points is that "[n]o one is to be told that he is in the Mug Book." *Id.* In addition, although a person cannot be asked to leave a casino solely because his name appears in the Mug Book, the accused might never be certain of the reason for exclusion, since Nevada trespass law does not require that a reason be given for such an exclusion. *Id.* at 264. Thus, since the book is secretly distributed, those accused of being criminals or card counters are denied an opportunity to confront such charges.

136. K. USTON, MILLION DOLLAR BLACKJACK, *supra* note 15, at 16.

137. A study conducted in Atlantic City casinos in 1980 showed that a "basic strategy player" (basic strategy is the "optimum way for the blackjack player to play his hands if he is not counting, given a prescribed set of house rules") has a .04% edge over the casinos, while a *conservative* card counter has a .25% edge. *Id.* at 267, 318. Although a .25% (i.e. one quarter of one percent) edge might not seem significant at first glance, one must remember that this calculation does not consider how the counter bets. Since the counter bets heavily only when the deck is "rich" in high cards, such an edge presents the opportunity to generate a significant amount of money over a period of time. *See supra* note 135.

138. While card counters pose no criminal threat to the gambling industry, they face potential physical abuse if they are ejected from the premises. In the recent case of Prinz v. Greate Bay Casino Corp., 705 F.2d 692 (3d Cir. 1983), a card counter filed false imprisonment and assault claims against a casino, alleging he suffered various injuries because of the force employed by the casino's security guards. The plaintiff had not been disorderly, nor did he create a disturbance; he was excluded solely because he was a card counter. *Id.* at 695. However, the plaintiff's guilty plea to a charge of defiant trespass estopped his claim, although he asserted that the plea was obtained through duress. *Id.* at 693-96.

139. 89 N.J. 163, 445 A.2d 370 (1982).

140. *See supra* notes 15, 35.

141. N.J. ADMIN. CODE § 19:47-2.5 (Supp. 1980). The new rule changed the way cards were shuffled. *Uston*, 89 N.J. at 166, 445 A.2d at 371-72. Atlantic City casinos deal blackjack with several decks of cards. A yellow plastic card (known as a "cutting card") is placed near the bottom of the deck to indicate when the cards must be re-shuffled. The new rule places

reasonable access to public places."[142] The court also noted that the absolute right to ban people from places of amusement has changed over time.[143] This was reflected in its previous decision in *State v. Schmid*,[144] where it recognized that "the more private property is devoted to public use, the more it must accommodate the rights which inhere in individual members of the general public who use that property."[145] From this, the *Uston* court concluded that proprietors "have a duty not to act in an arbitrary or discriminatory manner."[146]

The court's concern in *Uston* was to prevent the arbitrary exclusion of patrons. It held proprietors of places of amusement equally accountable to prospective customers. *Uston* is directly applicable to racetrack exclusion cases since, aside from casino blacklisting policies, the statutory standards used to exclude each respective patron are similar.[147]

C. *Application of* Uston *to Horse Racing Cases*

Uston provides a prime illustration of a proprietor's attempt to extend gambling regulations beyond their stated purpose.[148] Card counters, for example, do not pose a threat to the integrity of gambling. For instance, Mr. Uston does "not threaten the security

---

the yellow card closer to the bottom of the decks of cards, thus enabling the dealer to deal out more "hands." This generates extra profits for the casino, yet also enables card counters to more accurately predict when certain cards would appear (the more cards seen narrows the possibilities of which cards will appear next).

142. *Uston*, 89 N.J. at 168, 445 A.2d at 372.

143. *See, e.g., id.* at 171, 445 A.2d at 374.

144. 84 N.J. 535, 423 A.2d 615 (1980), *appeal dismissed as moot sub nom.* Princeton Univ. v. Schmid, 455 U.S. 100 (1982) (per curiam).

145. *Uston*, 89 N.J. at 172, 445 A.2d at 374 (quoting *Schmid*, 84 N.J. at 562, 423 A.2d at 629).

146. *Id.* at 173, 445 A.2d at 375.

147. *Compare* the statute appearing *supra* note 131 *with* those appearing *supra* notes 77, 91, 97, 125.

148. "Although the Commission alone has authority to exclude persons based upon their methods of playing licensed casino games, that authority has constitutional and statutory limits." *Uston*, 89 N.J. at 174, 445 A.2d at 375. The Casino Control Act abrogates the proprietor's common law right to exclude patrons. *Id.* at 167, 445 A.2d at 372. This statute can only be changed through a statutory mandate by the Commission. *Id.* at 162, 174, 445 A.2d at 372, 375. The Commission must, however, assure "fair odds to and maximum participation by casino patrons," N.J. STAT ANN. § 5:12-100(e) (emphasis deleted), and maintain "public confidence and trust in the credibility and integrity of the regulatory process and of casino operations." *Id.* § 5:12-1(6). *Uston*, 89 N.J. at 174-75, 445 A.2d at 375-76. The exclusion of card counters may serve to diminish this "public confidence." *Id.*

of any casino occupant."[149] The *Uston* decision limits statutory abuse by balancing a patron's right to admission favorably against a casino proprietor's right to exclusion, and by holding the latter to a public calling standard. However, this standard is limited to excluded individuals from the general public rather than those with vocational interests, as the New Jersey Supreme Court subsequently decided in *Marzocca v. Ferrone.*[150]

In *Marzocca*, a horse owner was barred from events at the defendant's racetrack after he removed his horse from a race in order to qualify for a more lucrative race at a different racetrack.[151] The defendant claimed that the plaintiff's actions decreased betting for that race, since a specified number of horses was needed to avert the cancellation of events or the possibility of running "short fields."[152] The New Jersey Appellate Division of the Superior Court, applying the *Uston* standard, stated:

> Until very recently private enterprises, even those generally open to the public, were regarded in this State as enjoying the absolute common law right, here asserted, to arbitrarily exclude or eject any person where such action did not violate state and federal civil rights laws or constitutional considerations. Lately, however, a decision by our Supreme Court has severely affected that common law principle. *Uston v. Resorts Int[ernationa]l Hotel, Inc.* That case graphically illustrates the court's departure from the apparent reiteration of the absolute exclusionary rule in *Garifine v. Monmouth Park Jockey Club.*[153]

The New Jersey Supreme Court reversed on this issue, however, because the plaintiff at the raceway was "not a patron . . . in the same way that Uston was a patron of the casino."[154] The court recognized that "[a] close examination of the language in *Uston* that concerns the common law right to exclude makes clear that that decision was not intended to reach beyond concerns for the general public."[155] Thus, the *Marzocca* court did not comment upon the status of the law in the amusement proprietor/patron context,[156] although it did explicitly "limit the common law doc-

149. 89 N.J. at 174, 445 A.2d at 375.

150. 93 N.J. 509, 461 A.2d 1133 (1983).

151. *Id.* at 512, 461 A.2d at 1134-35.

152. *Id.* at 512, 461 A.2d at 1135.

153. Marzocca v. Ferrone, 186 N.J. Super. 483, 490, 453 A.2d 228, 231 (1982), *rev'd in part*, 93 N.J. 509, 461 A.2d 1133 (1983).

154. *Marzocca*, 93 N.J. at 516, 461 A.2d at 1137.

155. *Id.*

156. *Id.* Thus, it did not address the issue of whether *Garifine* should be overruled. *Id.* at 512, 461 A.2d at 1134.

trine [to exclude patrons] by proscribing exclusions that violate public policy."[157] Accordingly, the court probably left available the opportunity to extend the *Uston* balancing-of-rights test for casino patrons to those excluded from racetracks.

This Comment suggests that the balancing approach used in *Uston*—holding casino proprietors to a public calling standard—should be adopted to prevent unreasonable exclusions of patrons from racetracks and casinos. It also proposes that proprietors must show "cause" for excluding "undesirables" when an excluded person's activity does not explicitly fall within a state statute's definition of an "undesirable."[158] Such a requirement would serve a dual purpose. First, it would require state legislatures to draft more precise statutes which explicitly define what the term "undesirable" means.[159] Second, it would provide proprietors with clear guidelines for screening patrons. Such clarity is needed because the statutes which presently govern the proprietor's right to exclude patrons arguably are constitutionally "void for vagueness."[160]

III. Constitutional Remedies for Excluded Patrons

Racetrack and casino proprietors should be held to a public calling standard, based upon the close involvement that their enterprises have with the state.[161] Although state action arguments invariably have failed as a remedy for aggrieved patrons, these arguments have rested solely upon procedural, rather than upon substantive, due process grounds.[162] If state statutes governing the banning of "undesirables" can be shown to be constitutionally "void for vagueness," substantive due process claims might be viable. If this alternative fails, however,[163] the *Uston* balancing approach provides the most viable state-level remedy.[164]

---

157. *Id.* at 517, 461 A.2d at 1137.

158. *See infra* text accompanying notes 196-200 and Model Statute in appendix.

159. *See* Model Statute in appendix.

160. *See infra* section III(B).

161. *See infra* notes 168-75 and accompanying text.

162. *See* Rodic v. Thistledown Racing Club, Inc., 65 F.2d 736 (6th Cir.) (patron, excluded as an "undesirable," did not establish a property interest needed for a procedural due process hearing), *cert. denied*, 449 U.S. 996 (1980).

163. *See infra* text accompanying note 185.

164. *See supra* text accompanying notes 139-47.

A. *Establishing State Action as a Remedy for Aggrieved Patrons*

In *Burton v. Wilmington Parking Authority*,[165] the United States Supreme Court set forth a test to determine whether a private enterprise is affected by a state interest. In *Burton*, a black man was refused service by a restauranteur-lessee of the Wilmington Parking Authority, an agency of the state of Delaware. The Court found that state action existed because

> [t]he state has so far insinuated itself into a position of interdependence with Eagle [Restaurant] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment.[166]

The Court held differently, though, in *Moose Lodge v. Irvis*,[167] where a Pennsylvania liquor licensing regulation for a fraternal organization was found not to create a sufficiently "close nexus" between the state's interest and the interest of a black man excluded from the club to qualify the exclusion as state action. However, it seems apparent that exclusion from racetracks and casinos compels a greater degree of state involvement than does exclusion from a fraternal organization, since the former are business entities open to the general public, whereas the latter is merely an exclusive private club.

The state action claim in *Burton* was based upon the fact that the restaurant from which the patron was denied service was leased to the owner by the state.[168] Consistent with this analysis, many racetracks, such as some in New York,[169] are leased by the state to proprietors. The New York Jockey Club created a nonprofit racing association, which was given a franchise to operate New York's three major tracks.[170] These thoroughbred tracks have not been owned privately since 1955.[171] This appears to draw the

---

165. 365 U.S. 715 (1961).

166. *Id.* at 725.

167. 407 U.S. 163 (1972). The Court held that "where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations' in order to find 'state action.'" Id. *at 173.*

168. *Burton*, 365 U.S. at 715.

169. The New York Racing Association operates three major New York racetracks—Aqueduct, Belmont Park and Saratoga. S. FINK, A LEGISLATIVE PROPOSAL TO ENHANCE THOROUGHBRED RACING IN NEW YORK 1-2 (Mar. 14, 1981).

170. *Id.* at 1.

171. *Id.*

state into "a position of interdependence"[172] with New York racing activity, and makes it difficult to reconcile such state involvement with New York's common law right to exclude "undesirables."[173] Similarly, casino establishments are in a position of interdependence with the state. For example, casino gambling was legalized in Atlantic City for the purpose of revitalizing that city.[174] In addition, it is the stated public policy of Nevada that "[t]he gaming industry is vitally important to the economy of the state and the general welfare of its inhabitants."[175]

The decision in *Jackson v. Metropolitan Edison Co.*,[176] however, may serve to substantially limit a state action claim brought by an excluded patron. The Supreme Court in *Jackson* refused the petitioner's claim for state action against a public utility, since "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment."[177] Merely because an entity has a monopoly on a public service, it does not necessarily follow that a *Burton*-type "symbiotic relationship" with the state exists.[178] Thus, although there appears to be a close nexus between the state and the activities of racetrack and casino proprietors, the courts would probably be reluctant to uphold a state action claim.

---

172. *See supra* text accompanying note 166.

173. Presti v. New York Racing Ass'n, 46 A.D.2d 387, 387, 363 N.Y.S.2d 24, 24 (1975). *Cf.* ILLINOIS HORSE RACING—A STUDY OF LEGISLATION AND CRIMINAL PRACTICES 102 (1974). Illinois is the only state which provides state security enforcement at tracks (most tracks hire private guards). State enforcement is necessary because racetrack managements' security interests differ entirely from those of state authorities: "Management is primarily interested in protecting its physical assets. The racing public's welfare is only considered by management if there is a concomitant threat to management's financial welfare." *Id.* at 83. Such involvement draws racetracks into a position of interdependence with the state of Illinois, which strengthens potential state action arguments.

174. *See* Rose, *supra* note 135, at 278 n.174. Atlantic City requires that two percent of any casino's gross revenue be committed to urban renewal. *See* Mann, *Gambling Rage Out of Control?*, U.S. NEWS & WORLD REP., May 30, 1983, at 29. An example of the effort to revitalize Atlantic City is the Casino Control Commission's reluctance to grant Resorts a renewal of its casino license, since "Resorts hadn't done enough to finance new housing in Atlantic City." Wall St. J., Feb. 2, 1983, at 10, col. 2.

175. NEV. REV. STAT. § 463.0129(1)(a) (1981).

176. 419 U.S. 345 (1974).

177. *Id.* at 350.

178. *Id.* at 351-52.

B. *"Undesirable" Patron Statutes as Constitutionally "Void for Vagueness"*

Most of the racetrack exclusion cases litigated in federal courts have dealt with requests for a procedural due process hearing before permanent exclusion from a racetrack.[179] Since a property interest must be shown for such a hearing, patrons have had little success in obtaining hearings of this nature.[180] An alternative for aggrieved patrons might be to argue on substantive due process grounds that the existing statutes are "void for vagueness."[181]

The issue of whether a statute is "void for vagueness" arose in *Papachristou v. City of Jacksonville*,[182] where a vagrancy ordinance " 'fail[ed] to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.' "[183] Similarly, it appears that the statutes which ban "undesirables" from racetracks and casinos are overbroad and do not provide patrons with "anything like a reasonably clear signal of the shoal waters of criminality."[184] It is extremely difficult to convince the courts, however, that a state statute should be voided: "The day is gone when th[e Supreme] Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."[185]

It is evident that excluded patrons would be afforded little redress in federal court. Their best remedy would be, therefore, the *Uston* state-level balancing approach—establish the fact that gambling enterprises are public entities, and then argue for the common law right of access to public places.[186] This New Jersey case

---

179. *See* Barry v. Barchi, 443 U.S. 55 (1979) (horse trainer afforded procedural due process hearing); Jacobson v. New York Racing Ass'n, 33 N.Y.2d 144, 305 N.E.2d 765, 350 N.Y.S.2d 639 (1973) (owner-trainer); Fitzgerald v. Mountain Laurel Racing, Inc., 607 F.2d 589 (3d Cir. 1979) (trainer and driver), *cert. denied*, 446 U.S. 956 (1980).

180. Patrons do not have a property interest in attending races, as a trainer or jockey might. *See supra* note 162.

181. *See* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

182. *Id.*

183. *Id.* at 162 (quoting United States v. Harriss, 347 U.S. 612, 617 (1954)).

184. United States v. Matthews, 419 F.2d 1177, 1180 (D.C. Cir. 1969).

185. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955).

186. It should be noted here that a proprietor's activity may fall under a public calling standard at common law, and not fall under a state action standard with a federal claim. For example, if state action was not established in the *Burton* case, the restauranteur could

could serve as a cornerstone for a reassessment of the statutory standards applied in jurisdictions which still uphold a proprietor's common law right to exclude patrons arbitrarily.

CONCLUSION

In light of the public nature of racetracks and casinos, the common law right to exclude patrons arbitrarily from these establishments should be abrogated. Proprietors of such businesses should be held to a *Uston* public calling standard in order to prevent arbitrary or mistaken exclusions. Racetracks and casinos are distinguishable from other places of amusement, since the state generally has a greater monetary and social interest in regulating the former.[187] It is beyond the scope of this Comment, however, to suggest that the public calling standard be applied to all gambling-related businesses. This determination possibly could be made by balancing the private interests of a particular gambling industry with society's interest in providing access to public places.[188] In this way, the public calling standard would not be applied to establishments of private character, as contemplated in *Moose Lodge v. Irvis*.[189] Once this determination is made, though, state legislatures must then define with greater precision and clarity which patrons should be considered "undesirable."

The need for liberal statutory reform stems from the prevalent lack of uniformity in the courts' interpretation of what constitutes an "undesirable" person. In order to construct a statute affording patrons protection against arbitrary discrimination, a balance must be made between a patron's rights and public policy demands. It must not, therefore, effectively allow corruptive elements into the gambling industry.[190] This Comment proposes such a statute in an effort to reconcile the tension between conflicting demands.[191] The public policy concerns expressed in the proposed statute reflect the

---

have been held to a common law public calling standard at state law, since innkeepers are held to such a standard. *See Madden*, 296 N.Y. at 253, 72 N.E.2d at 698.

187. *See supra* text accompanying notes 26-27.

188. Jai alai establishments, for example, obviously would be subject to stricter state regulations (based on, for instance, more money generated to the state), than would the local "bingo parlor" (although "some bingo players have devised elaborate cheating schemes"). GAMBLING IN AMERICA, *supra* note 22, at 164.

189. 407 U.S. 163 (1972). *See supra* text accompanying note 167.

190. *See supra* note 18 and accompanying text.

191. *See* Model Statute in appendix.

concerns presented by provisions in the various casino statutes previously discussed.[192] These provisions include the recognition that gambling is vitally important to a state's economy;[193] that "public confidence" can only be maintained through strict regulation;[194] and that patrons must be afforded "fair odds" and "maximum participation."[195] In addition, however, the gambling industry should be held explicitly to a public standard,[196] so that arbitrary exclusions will be avoided.

Several factors should also be considered in defining the term "undesirable." First, some state statutes only require that a "belief" of a patron's "undesirable" traits be shown before exclusion.[197] Licensees should be required to have "knowledge" of these traits in order to avoid mistaken exclusions. Second, contrary to the New York statute,[198] a person should not be excluded for merely associating with an "undesirable," unless it is shown that his actions conformed with the actions of the "undesirable." Finally, if a person is excluded based upon a prior criminal act, consideration should be given to how much time has passed since the crime was committed.[199] Such an inquiry could be made at a hearing conducted by the state's racing or casino commission immediately after exclusion.[200]

The public policy behind excluding "undesirables" rests with the desire to cleanse the gambling industry of crime and corruption. This notion must be factored in when considering liberal statutory reforms. Such notions must be questioned, however, when the potential for constitutional violations exists through the courts'

---

192. *See supra* section II(B).

193. *See supra* note 175 and accompanying text (referring to NEV. REV. STAT. § 463.0129(1)(a) (1981)).

194. NEV. REV. STAT. § 463.0129(1)(c) (1981).

195. N.J. STAT. ANN. § 5:12-100(e) (West Supp. 1983-1984).

196. *See supra* note 2.

197. *See, e.g.*, N.J. ADMIN. CODE tit. 13, § 13.70-1.17 (1969) (patrons may be excluded if they are "believed" to be bookmakers).

198. *See* the New York statute, *supra* note 125, at subsection (e).

199. Other evidence of "prior bad acts" should be factored into the decision as well. *See supra* text accompanying notes 95-101.

200. A preliminary injunction preventing exclusion *before* such a hearing probably would not be granted, absent some property interest. *See, e.g.*, Rodic v. Thistledown Racing Club, Inc., 65 F.2d 736 (6th Cir.) (patron, excluded as an "undesirable," did not establish a property interest needed for a procedural due process hearing), *cert. denied*, 449 U.S. 996 (1980).

illusory perception that the racetrack and casino gambling industries are inherently private entities.

APPENDIX

Model Statute

1. *Title.* Exclusion of Patrons From Racetracks and Casinos.

2. *Purpose.* The purpose of this Act is to protect the vital interests of the gambling industry by safeguarding it from corruptive elements in society.

3. *Policy concerning gambling.* The public policy of this state is that:

a) the gaming industry is vitally important to the economic growth of the state and to the general welfare of its inhabitants;

b) public confidence can only be maintained in the industry through strict regulation of all people associated with the industry;

c) in no way will the regulation suggested in subsection 3(b) of this Act diminish the fair odds to and maximum participation by gambling patrons; and

d) the racetrack and casino gambling industries, inasmuch as they are heavily regulated by this state (and in recognition of subsection 3(a) of this Act), are public entities.

4. *Exclusion of patrons.* A proprietor may exclude, subject to sections 5 and 6 of this Act, all undesirable people from his racetrack or casino, whose past or present actions are deemed in their judgment to be detrimental to the best interests of the gambling industry.

5. *Undesirable person defined.* An undesirable person is a prospective or present patron who: a) is known to be involved in illegal wagering or activity, is a bookmaker or tout[201] at a racetrack, or is in violation of the gaming laws of any state; or b) has been convicted of a felony or a crime involving illegal gambling, gambling fraud, or moral turpitude; or c) acts in an affirmative manner to create or perpetuate a disturbance or action which is detrimental to the best interests of the gambling industry.

---

201. For a definition of "tout," see N.Y. ADMIN. CODE tit. 9, § 4119.8(c), *supra* note 125, at subsection (b).

6. *Limits on exclusion.* Racetrack and casino proprietors may not exclude a patron:

a) for merely associating with an undesirable, unless the patron acts in a way consistent with subsection 5(c) of this Act; or

b) permanently (through a court injunction), based solely on a criminal conviction or illegal act, if the connection between such acts and the issue of exclusion is sufficiently attenuated by time (at least 10 years); or

c) arbitrarily or without good cause; or

d) for reasons of race, color, national origin, sex or religion.

PERRY Z. BINDER